

2523



LEASEHOLD VALUATION TRIBUNAL
(Southern Rent Assessment Panel)

Case Reference: CHI/43UC/OCE/2011/0020

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Applicant: Lynwood Road (Epsom) Limited
Respondent: Mr. R. G. Frankel
Property: 9 Lynwood Road, Epsom, Surrey KT17 4LF
Date of Hearing 11th June 2012

Appearances

Applicant

Mr. Jonathan Upton, Counsel
Mr. Graham Randall FRICS
Miss Jolanda Peters, TWM Solicitors
Mr. R. Allen

Respondent

Mr. Gerard Van Tonder, Counsel
Mr. Joshua Steinhaus, DWFM Beckman
Mr. R. Frankel
Mr. I. Asbury MRICS

Leasehold Valuation Tribunal

Mr D. R Whitney LLB (Hons) (Lawyer Chairman)
Miss C. D. Barton BSc MRICS (Valuer)
Mr. D. Lintott FRICS (Valuer)

Date of Decision 9th July 2012

BACKGROUND

1. This is an Application by the Nominee Purchaser, Lynwood Road (Epsom) Limited, to determine the price payable and terms of the collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993.
2. The matter was heard by the Tribunal on 11th June 2012 following an inspection of the property 9 Lynwood Road, Epsom, Surrey KT17 4LF ("the Property").

INSPECTION

3. The Tribunal inspected the site on the morning of the hearing. The Property is a large, turn of the 20th century house situated in a residential road. The Tribunal understands it has been converted into 5 self contained flats within the main building although the Tribunal did not go inside. Outside to the left of the property, looking from the road, is a large garage (which we understand is demised to Flat 1) and to the right separate from the main building with it's own driveway from the road is a block of 3 garages. The house itself is set in a substantial plot with significant space to the front and rear of the property.

LAW

4. The law relating to this application is set out in the Leasehold Reform Housing and Urban Development Act 1993 ("the Act"). The Tribunal had regard to the provisions of the Act and sections referred to in this decision are from the Act. In particular we were referred to and relied upon:

Section 1 The right to collective enfranchisement..

(1) This Chapter has effect for the purpose of conferring on qualifying tenants of flats contained in premises to which this Chapter applies on the relevant date the right, exercisable subject to and in accordance with this Chapter, to have the freehold of those premises acquired on their behalf— .

(a) by a person or persons appointed by them for the purpose, and .

(b) at a price determined in accordance with this Chapter; .

and that right is referred to in this Chapter as “the right to collective enfranchisement” .

(2) Where the right to collective enfranchisement is exercised in relation to any such premises (“the relevant premises”)— .

(a) the qualifying tenants by whom the right is exercised shall be entitled, subject to and in accordance with this Chapter, to have acquired, in like manner, the freehold of any property which is not comprised in the relevant premises but to which this paragraph applies by virtue of subsection (3); and .

(b) section 2 has effect with respect to the acquisition of leasehold interests to which paragraph (a) or (b) of subsection (1) of that section applies. .

(3) Subsection (2)(a) applies to any property if at the relevant date either— .

(a) it is appurtenant property which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or .

(b) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises (whether those premises are contained in the relevant premises or not). .

(4) The right of acquisition in respect of the freehold of any such property as is mentioned in subsection (3)(b) shall, however, be taken to be satisfied with respect to that property if, on the acquisition of the relevant premises in pursuance of this Chapter, either— .

(a) there are granted by the person who owns the freehold of that property]— .

(i) over that property, or .

(ii) over any other property, .

such permanent rights as will ensure that thereafter the occupier of the flat referred to in that provision has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or

(b) there is acquired from the person who owns the freehold of that property the freehold of any other property over which any such permanent rights may be granted. .

(5) A claim by qualifying tenants to exercise the right to collective enfranchisement may be made in relation to any premises to which this Chapter applies despite the fact that those premises are less extensive than the entirety of the premises in relation to which those tenants are entitled to exercise that right. .

(6) Any right or obligation under this Chapter to acquire any interest in property shall not extend to underlying minerals in which that interest subsists if— .

(a) the owner of the interest requires the minerals to be excepted, and .

(b) proper provision is made for the support of the property as it is enjoyed on the relevant date. .

(7) In this section— .

“appurtenant property”, in relation to a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the flat;

...

"the relevant premises" means any such premises as are referred to in subsection (2).

(8) In this Chapter "the relevant date", in relation to any claim to exercise the right to collective enfranchisement, means the date on which notice of the claim is given under section 13

ISSUES

5. Whilst the price for the specified premises had been agreed the issues to be addressed by the Tribunal at the hearing can be summarised as:
 - Was the Applicant entitled to the transfer of the whole of the freeholders title or do the permanent rights offered by the Respondent freeholder in their counter notice satisfy section 1(4) of the 1993 Act
 - If the rights offered by the Respondent are not sufficient should the Respondent have to transfer the appurtenant land to the Applicant and if so what price should the Applicant pay
 - What price should the Applicant pay for the transfer of the garage block to the right of the Property (looking at the Property from Lynwood Road).

THE HEARING

6. Both parties were represented by Counsel. Before the hearing began both parties submitted to the Tribunal further documents and a paginated bundle had been received in from the Applicants solicitors on the Friday morning (8th June 2012) preceding the hearing on the Monday. At the start of the hearing both counsel confirmed they were happy to proceed and had had an opportunity to consider all the extra documents.

7. The Tribunal expressed its concern about the late introduction of documents and evidence. Directions had been given requiring all documents to be filed with the Tribunal panel office by 31st May 2012. The purpose is to ensure all parties and the Tribunal have had adequate opportunity to consider matters in advance of the hearing to assist with the good running of the same. The parties were asked in light of the late service that if there were any documents relevant to the case they must ensure that the Tribunal was specifically directed to them.
8. Counsel for the Respondent confirmed that the exercise of an option to purchase a leasehold interest in the undemised garage by the Owner of Flat 4 was conceded and it was accepted that the freehold title of the garage block subject to the premium should be transferred to the Applicant.
9. Counsel for the Applicant took the Tribunal through his skeleton argument. He referred to the lease of flat 1 and it was to this lease that the Tribunal was directed throughout the hearing (it being agreed that the relevant clauses in the lease were mirrored in the other leases for the building). He highlighted that clause 1 of the lease (at page 3 of the lease of flat 1) set out the rights granted being:
 - (a) Rights of way over such parts of the building and of the Estate as afford access to the Demised Premises
 - (b) The right to use existing and future conduits
 - (c) The benefit of the covenants stipulations and restrictions imposed by the leases of the other flats in the Building
 - (d) The right of support and protection from the Building as presently enjoyed
 - (e) Such rights of access and entry upon the Estate and/or Common Parts and/or the other flats in the Building with or without workmen and materials as may be necessary for the proper performance of the Lessee's obligations hereunder provided that the Lessee shall (i) have given reasonable prior notice (save in the

case of emergency) of intention of carrying out obligations to the occupier of the Flat to which he requires access (ii) make good any damage resulting from his exercise of this right

- (f) The right to place one dustbin in the area (if any) so marked on the said plan
- (g) The right to use any garden area in the Estate for purposes of quiet recreation only.

The Estate was defined as:

“the Estate” means the Lessor’s land surrounding the Building and forming the site of the Building the title to which is registered at H. M. Land Registry under the title number mentioned in Part 5 of the Schedule hereto

10. Counsel for the Applicant asked the Tribunal to consider what was meant by “garden”.

Counsel referred to the principles contained in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 In his submission the Respondent should not differentiate between the different areas of land surrounding the property as they had looked to do with regard to the rights offered and the different areas defined on the plan attached to the counter notice. He referred us to Hague on Leasehold Enfranchisement 5th edition 2-14 and the reference to Methuen-Campbell v. Walters [1979] 1 QB 525.

11. Counsel for the Applicant said the Tribunal needed to be satisfied that the rights proposed need to be permanent rights in accordance with section 1 (4)(a)(i) of the Act. He submitted that by simply looking to offer rights on foot and only over the pathways this limited the rights beyond what the rights contained in the lease. He suggested that the rights offered

were more limited than those contained in the leases. He submitted that the rights should mirror the rights in the lease if they were to satisfy the test under section 1(4).

12. He referred us to Shortdean Place (Eastbourne) Residents Association Ltd v. Lynari Properties Ltd [2003] 3 EGLR 147. He accepted that in light of this if the rights granted were nearly the same as the rights which the leaseholders currently enjoyed then the Tribunal had no discretion and the Respondent could retain the appurtenant land. If however the rights were not the same the Tribunal retained a discretion as to whether the appurtenant land should be transferred and if not what rights should be granted. He also referred to Ulterra Ltd v. Glenbarr (RTE) Company Ltd [2007] 04 EG 174.

13. Counsel for the Applicant referred to the counter notice which included a claim by the Respondent to be able to redevelop the appurtenant parts he was seeking to retain. The Applicant contended that under the leases there was currently only a right to redevelop adjoining land (to the estate) and clearly this request for a right went beyond rights currently enjoyed by the Respondent. The proposed retained land was not adjoining land under the current lease but part of the Estate as defined in the leases. In his view, following Ulterra, you must look at the counter notice as a whole and the rights being offered did not mirror those in the leases and the Tribunal retained a discretion and should transfer all the land to the Applicants.

14. Counsel for the Applicant referred us to various statements from residents to be found at the rear of the bundle. It appeared only a Mr Rodney Allen would be appearing and giving oral evidence. He confirmed the contents of his statement and was then cross examined by counsel for the Respondent. In summary he confirmed that whilst he had been told he could park there was nothing in his lease which allowed him to park on the land coloured purple on the Respondents plan attached to the counter notice (this was land on either side of the driveway leading to the separate garage block). He agreed that the land marked purple was covered in high shrubs and that the invoices which formed part of the service

charge simply referred to gardening services and no mention to works to erect any posts or fences which it was agreed had been erected by the Respondent in or about October 2010 to stop parking on the purple land.

15. The Applicant then called Graham Randall FRICS who had submitted a report, which was included in the bundle, dated 18th April 2012. It was confirmed that the price for the building had been agreed at £8,500. In his opinion this figure also included any premium payable in respect of the two garages already demised under the leases. For the appurtenant land including the garage block in his opinion the correct price payable was £17,000 with £7,000 being the price payable for the exercise of the garage option and £10,000 for the remaining areas of garden.
16. Mr Randall referred to his comparables in respect of the garage and the fact that in his opinion, given the option provided that the market value shall be "the open market value to a lessee of one of the flats at the Homestead..." he felt this restricted the market given it was only leaseholders of this block. In his view a minimum of £2-3,000 deduction was required for repairs to the garage. A further deduction from the open market value should be made given his opinion as to the restrictive market. Therefore the value of the garage at the valuation date was £7,000.
17. With regard to Mr Asbury, the Respondents valuer's method he felt that he did not provide a lot of evidence in respect of capital values and a number of the comparables did not relate to actual sales.
18. As to the additional land in his view the value was £10,000. This was a broad approach relying on his experience. He did not agree that any part of the land had development potential since the leaseholders had rights over the gardens and there was no effective access to the rear garden. He referred to 2 failed planning applications included in the bundle. In his view as an experienced local surveyor he could not see any planning permission for development being granted.

19. He calculated his figure of £10,000 on the basis that there was a benefit to the leaseholders in gaining control particularly given there was no actual demise of the garden under the leases and this had a value to the Applicant.
20. During cross examination Mr Randall did concede the value of the garage at the valuation date without deductions for what he perceived was the restrictive market was £9,000 as referred to at paragraph 4.5 of his report. He was questioned about parking arrangements at and near by the property. Whilst he conceded that if parking restrictions were put in the road this may affect value in his opinion this was unlikely to happen. He would not accept that development was likely.
21. When questioned by the panel Mr Randall felt that the increase in value to the residential units was likely to be relatively nominal if they had the garden areas and likely to effect value by less than 1%
22. Counsel for the Respondent agreed that the price to be paid for the specified premises was £8,500 however this was simply the main building and included nothing for the appurtenant land which included everything outside the building including the garage block and the demised garages.
23. In his submission whilst two flats have garages demised to them you cannot include the value of these garages with the specified premises. In his view the method adopted by Mr Asbury (the Respondents valuer) to include a further sum of £500 is to be preferred.
24. With regard to the option over the remaining garage this was exercised the day before the date of the section 13 notice. It was conceded that this created a contract subject to the enfranchisement. The Respondent is however entitled to the value this will create.
25. With regard to the appurtenant land and the rights counsel for the Respondent contended that the rights offered were sufficient. He looked to suggest that the parties must have intended garden to mean something different from the Estate or they would simply have referred to the Estate which was defined. In his opinion the garden is not the same as the

Estate and the Respondent is entitled to divide the areas up as it has sought to do on the plan attached to the counter notice.

26. The Respondents counsel submitted that little weight should be given to the statements of people not present. With regard to the valuers they have adopted different approaches and unclear how Mr Randall settled on a figure of £10,000. Property developers bide their time and if they lose the right to redevelop then they should be paid for this.
27. Counsel submitted that Section 1(4) entitles the freeholder the right to retain appurtenant land provided that permanent rights are granted. He agreed that Shortdean confirms that the Tribunal only have discretion when the rights are not the same or similar. He submitted that the rights offered satisfy the test as they are the same or nearly the same as those contained in the leases. In his submission they did not reduce the rights which the leaseholders already enjoyed.
28. Counsel for the Respondent did concede that there was an error in the plan attached to the counter notice and that the pathway between the garage block and the building and the area to the rear of the building both currently uncoloured should be coloured yellow.
29. With regard to the restrictive covenant sought by the Respondent whilst counsel accepted the reservation in the lease refers to "adjoining land" such a covenant is reasonable and required.
30. Counsel then called the Respondent to give evidence. In summary the Respondent stated that the leases did not provide any rights to park on the driveways and that in October 2010 he had written to leaseholders and paid for contractors to erect fences alongside the driveway to the garage block. He also referred to planning applications and that previously an indication had been given that he could be granted permission for an alternative scheme to the ones submitted and rejected. He showed the Tribunal a plan and said that he had received a letter from the planners but this was not produced. He had not pursued this but as with all developers "tinkered" with such schemes from time to time.

31. Counsel then called Ian Asbury MRICS who had submitted a proof of evidence dated 11th October 2011 and a proof dated 9th June 2012.
32. Mr Asbury took the view that there was redevelopment potential. Further in his opinion there was a significant advantage to the leaseholders in having the appurtenant land in that they could create parking for themselves. In his view the land went beyond being just amenity land and had a significant value. He believed that given the leases currently lacked parking the leaseholders were disadvantaged. He was of the opinion that the £10,000 proposed by Mr Randall was insignificant when taking account of the values of the 5 flats.
33. In his proof he provided that he felt the correct value of the garage was £11,000. In total for the appurtenant land, if this should be transferred as a whole, the value should not be less than £37,500 in addition to the £8,500 agreed for the specified premises. His view was that the right to be able to park cars on the appurtenant land and having control over this attracted a high value and he felt £2,500 per space on the basis that five spaces could be easily accommodated was not unreasonable and hence reached a figure of £12,500. He had considered potential development which the respondent had told him he believed was possible for one house to be built. He had then discounted what he believed was the site value to take account of the lack of planning at the valuation date. This came to a figure of £37,500.
34. On cross examination in respect of the garage value he accepted that freehold sales may be best but did not accept that rental levels are irrelevant. In his opinion issues with regards to parking were part of what lay behind the desire to enfranchise. In his opinion people prefer to park off the road. He had no evidence for individual parking spaces but used his expertise to achieve a figure of £2,500 per space.
35. In respect of the development value this is "hope" value. He had looked at auction sales for potential redevelopment sites to assist him in this exercise.

36. On questioning by the panel in his view the value of the flats would be improved by 5% or so if they owned a share in all the appurtenant lands.

37. Mr Randall was briefly recalled and advised that in his opinion if one assumed the garage values were £10,000 each then the value of the reversion of the two garages on standard principles would be £93. Mr Asbury broadly agreed saying £100.

DECISION

38. The Tribunal considered the rights proposed by the Respondent. In particular the Tribunal noted that the appurtenant lands were to be divided up into different areas. Further it was proposed that rights of way on foot over paths would be granted and no rights over the land marked purple on the plan being the shrub covered land on either side of the driveway to the garage block at all would be granted.

39. Having regard to the leases, section 1(4) of the 1993 Act and the various cases the Tribunal finds that the proposed rights do not match those rights which the leaseholders currently have. The proposed rights seek to limit the rights in various ways which are currently granted under clause 1 of the leases. In the Tribunal's opinion the area marked purple on the counter notice plan is part of the Estate and garden consisting as it does of well established shrubs and the location of this area.

40. Having reached this decision, as accepted by both counsel (following on from the Shortdean decision), the Tribunal have a discretion as to whether the appurtenant parts should be transferred. The Tribunal finds that all the land should be transferred. For the avoidance of doubt we find that the Applicant is entitled to have transferred to it all of the freehold title for 9 Lynwood Road which we understand is registered under title number SY655394.

41. In respect of the undemised garage the Tribunal considered the evidence of both valuers. In the Tribunal's opinion the leaseholders would be a special purchaser and do not believe

that the terms of the valuation in the option agreement reduce the value. Taking all of their submissions into account and the various comparables at the valuation date we find that the price payable for the garage is £10,000.

42. In respect of the demised garages given that they are demised under the leases for the individual flats we find that the premium payable for these is included in the price payable for the Specified Premises which is agreed at £8,500. In any event both valuers gave evidence that the value attributable for both is relatively de minimis amounting to approximately £100.
43. This leaves the value to be attached to the remainder of the appurtenant parts. The Tribunal finds that having considered the evidence there is no evidence of the site having development potential for which an element of "hope" value should be given. The Tribunal does however agree with the submissions of Mr Asbury that given currently the leaseholders have no rights to park on the property having control will afford them a not insignificant advantage. The Tribunal accepted Mr Asbury's submission that car parking spaces may be created. The Tribunal accepted his valuation of £12,500 for this element and that this is payable to the Respondent. Further the Tribunal determined that given the large size of the site as a whole an additional £1,000 should be payable for the balance of the appurtenant land being amenity land.
44. To summarise the Tribunal determines that the following sums are payable for the collective enfranchisement of 9 Lynwood road by the Applicant under the Act:

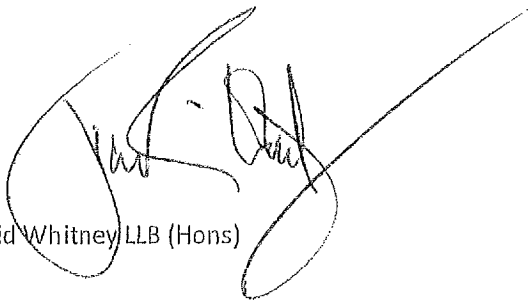
Specified premises £8500

Appurtenant land £13,500

Undemised garage £10,000

TOTAL £32,000

45. If the parties are unable to agree the form of transfer or the statutory costs payable they have liberty to apply.

A handwritten signature in black ink, appearing to read 'David Whitney', is written over the printed name. The signature is stylized and includes a long horizontal stroke extending to the right.

David Whitney LLB (Hons)

Lawyer Chairman